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No. 92-479

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Writ of Certiorari to the West Virginia Supreme Court of Appeals

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BRIEF OF *AMICI CURIAE* OWENS-ILLINOIS, INC. AND TEXACO INC. IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Owens-Illinois, Inc. ("Owens-Illinois") and Texaco Inc. ("Texaco") respectfully submit this brief as *amici curiae* in support of Petitioner with the consent of the parties. The letters of consent from counsel for Petitioner and Respondents have been filed with the Clerk of the Court.

Amici Owens-Illinois and Texaco take the position that the procedural due process analysis employed by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), was correct and should be applied in the instant case to reverse the judgment below.

The specific interests of Owens-Illinois and Texaco in the instant case are as follows:

Owens-Illinois

Owens-Illinois has a significant interest here because it is one of the defendants in the asbestos-related personal injury litigation. Owens-Illinois is, and always has been, primarily a manufacturer of glass bottles and jars. Its involvement in the asbestos-related personal injury litigation stems from a single type of insulation material known by the name "Kaylo," which contained approximately 15% asbestos. Owens-Illinois first manufactured Kaylo in commercial quantities in the late 1940's, and it ceased all manufacture of this product in April 1958—longer than three decades ago.

Today, because of this single product that it ceased making 35 years ago, Owens-Illinois is one of the defendants in tens of thousands of asbestos-related personal injury cases across the country. The large majority of these cases include claims for punitive damages. The Judicial Panel on Multidistrict Litigation has transferred the approximately 30,000 asbestos-related personal injury cases pending in federal court to Judge Charles Weiner of the U.S. District Court for the Eastern District of Pennsylvania. *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991). In those cases Judge Weiner has remanded for trial, or suggested to the Judicial Panel that it remand for trial, Judge Weiner has severed and retained in his court the claims for punitive damages for the reason that "the issue of punitive damages must be resolved at a further date with regard to the entire MDL." *E.g.*, Suggestion of Remand, MDL-875 (E.D. Pa. Apr. 29, 1992); Transfer Order, MDL-875 (E.D. Pa. June 3, 1992).

Since Judge Weiner recognizes the necessity for a uniform, nationwide resolution of the issue of punitive damages in the multidistrict litigation pending before

him, this Court's decision in the instant case will have an important bearing on the disposition of those claims.

The Judicial Panel lacks statutory authority to transfer cases pending in state courts. Thus, while Judge Weiner has coordinated his efforts to promote settlement with many state judges, the transfer of the federal cases has not directly affected the tens of thousands of asbestos-related personal injury cases in state courts across the country. (Owens-Illinois is a defendant in many of the state cases.) In contrast to the uniform approach adopted by Judge Weiner, the state courts in asbestos-related personal injury litigation have failed to apply *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), in any consistent way. Indeed, Owens-Illinois is now seeking a writ of certiorari from this Court to review a judgment by the Texas state courts awarding $1.2 million in punitive damages against Owens-Illinois. *Owens-Illinois, Inc. v. Pool*, 813 S.W.2d 658, 687 (Tex. Ct. App. 1991) (affirming punitive damages on ground that amount does not "shock the sense of mankind"), *writ of error dismissed*, No. D-1376 (Tex. Nov. 11, 1992), *cert. petition filed*, 61 U.S.L.W. —— (U.S. Jan. 22, 1993) (No. ——). (The first question presented in Owens-Illinois' petition for certiorari in *Pool* is identical to the procedural due process question in the instant case.)

The most unfair feature of the pending claims for punitive damages against Owens-Illinois is that it has already *paid* millions of dollars in multiple judgments for punitive damages arising out of a single, decades-old course of conduct. *E.g., Johnson v. Celotex Corp.*, 899 F.2d 1281, 1283 (2d Cir.) (affirming punitive damages against Owens-Illinois in two cases in the total amount of $1.8 million), *cert. denied*, 111 S. Ct. 297 (1990); *Roby v. Owens-Illinois, Inc.*, No. 91-3081, slip op. (6th Cir. June 8, 1992) (affirming award by one jury of $250,000 in punitive damages against Owens-Illinois, while second jury, after hearing same evidence,

refused to award punitive damages), *cert. denied*, 113 S. Ct. 411 (1992); *Bolyard v. Owens-Illinois, Inc.*, No. 913029, slip op. (W. Va. May 13, 1992) (declining to review $30,000 award of punitive damages against Owens-Illinois, where second jury, after hearing the same evidence, refused to award punitive damages), *cert. denied*, 113 S. Ct. 462 (1992). *Cf. Eagle-Picher Indus. v. Balbos*, 578 A.2d 228, 260 (Ct. Spec. App. Md. 1990) (concluding that evidence did not support award of punitive damages against Owens-Illinois), *aff'd in part and rev'd in part on other grounds*, 604 A.2d 445 (Md. 1992).

Texaco

Texaco also has a substantial interest in the Court's decision in the instant case. Texaco has seen in recent years two extremely disturbing developments: one, a tremendous explosion in punitive damages awards, and two, an erosion in the standard applied by courts for the award of punitive damages, both in charges to the jury and in appellate review. Texaco's recent empirical study, *Punitive Damages Explosion: Fact or Fiction?* (Washington Legal Foundation, Working Paper Series No. 50, Nov. 1992), has received wide discussion in legal symposia, publications, and in several briefs (including the *amicus* brief of the American Petroleum Institute and National Association of Manufacturers in support of the petition for certiorari in the instant case).[1] This study shows, on the most conservative basis possible, that punitive damages awards *affirmed* by appellate state and federal courts in four important and geographically diverse states have increased more than 117 times (after adjusting for inflation) between the time periods 1968-71 and 1988-91. *Id.* at 2-4. Since this trend represents *final* appellate dispositions, it reflects only the tip of the iceberg of punitive damages assessed against American businesses.

[1] In connection with that *amicus* brief, copies of the presentation of Texaco's empirical study of punitive damages were served on counsel for Petitioner and Respondents and lodged with the Clerk.

Punitive damages also have become untethered from the concept of maliciousness. *See generally, Smith v. Wade*, 461 U.S. 30, 57-88 (1983) (Rehnquist, J., dissenting). The most cogent proof to Texaco of this (besides the proliferation of requests for punitive damages in cases posing neutral conduct), was the case of *Mason v. Texaco Inc.* where a jury found Texaco liable for compensatory damages of $3 million (and other defendants for $6 million), and explicitly found that Texaco's conduct did not warrant an award of punitive damages. *See Mason v. Texaco Inc.*, 862 F.2d 242 (10th Cir. 1988) (reversing award of compensatory damages and remanding for new trial). On remand, a second jury found Texaco liable for the full $9 million in actual damages, and added a $25 million punitive damages award to the verdict. *See Mason v. Texaco Inc.*, 948 F.2d 1546 (10th Cir. 1991) (affirming punitive damages award with a remittitur to $12,500,000), *cert. denied*, 112 S. Ct. 1941 (1992).

SUMMARY OF ARGUMENT

This Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), adopted an analytically correct approach to the procedural due process implications of punitive damages. This case presents an opportunity to sharpen the *Haslip* analysis and clarify the due process principles governing punitive damages.

In *Haslip*, the Court identified the competing interests of the parties by noting the defendant's "interest in rational decisionmaking," and the State's interest in "meaningful individualized assessment of appropriate deterrence and retribution." *Id.* at 1044. The *amici* submit that this framework of competing interests should remain the focus of this Court's review of *TXO Production*.

Amici are of the view that the Court in *Haslip* did not intend to embed Alabama law into due process jurisprudence. Rather, the Court appears to have identified Alabama as one model of an adequate adjustment of the competing interests in this field. The Due Process Clause does not require a specific method of adjusting these interests, but it *does* require that they be adjusted on a rational basis.

Amici submit that in *TXO Production* the Court should identify three aspects of *Haslip* as presumptively required by procedural due process:

> *First*, the trial court should "reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." *Haslip*, 111 S. Ct. at 1044 (quoting *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986)). This requirement contemplates a post-verdict hearing in the trial court.
>
> *Second*, evidence of the defendant's wealth should be excluded from the jury so that "plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Haslip*, 111 S. Ct. at 1045.
>
> *Finally*, in considering whether a verdict awarding punitive damages is excessive, "the existence of other civil awards against the defendant for the same conduct" must be taken into account "in mitigation." *Id.*

Where a state elects not to provide one or more of these procedural safeguards, the burden would be on the plaintiff to establish that the alternative procedures adopted by that State were equally effective in protecting the defendant's interest in rational decisionmaking.

ARGUMENT

I. THE COURT'S PROCEDURAL DUE PROCESS ANALYSIS IN *HASLIP* WAS CORRECT, AND SHOULD BE APPLIED IN *TXO PRODUCTION*

In *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), this Court determined that the Alabama process for awarding punitive damages appropriately balances both the defendant's interest in rational decisionmaking and the State's interest in punishing and deterring wrongful conduct. *Id.* at 1044. Petitioner's challenge to the award of punitive damages in *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va.), *cert. granted*, 113 S. Ct. 594 (1992), can be resolved by the same analysis but with the opposite result: because the process provided by West Virginia completely failed in the instant case to balance the competing interests of the Defendant and the State, the judgment for punitive damages against Petitioner violates due process.

The Court's analysis in *Haslip* focused primarily on the procedures required by Alabama law in the post-verdict review of a jury's award of punitive damages. The purpose of that review, the Court reasoned, was to ensure that the amount of the punitive damages should not exceed that required to accomplish the goals of deterrence and retribution. *Haslip*, 111 S. Ct. at 1045. In this context, the Court's core holding appears to have been that due process is satisfied where state law gives appropriate recognition to the defendant's interest in rational decisionmaking in the judicial review of punitive damages verdicts.

A defendant's interest in rational decisionmaking is heightened in the punitive damages context because most juries receive vague instructions on the substantive standard of conduct that trigger an award of punitive damages. (The jury instructions in *Haslip* did not present

this due process issue because *Haslip* was a case of intentional fraud. *Haslip*, 111 S. Ct. at 1037 n.1.) The problem is most apparent in cases where different juries reach inconsistent verdicts on whether a set of facts warrants punitive damages. For example, in *Mason v. Texaco Inc.*, 948 F.2d 1546, 1559 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1941 (1992), two separate juries heard the same evidence concerning the defendant's conduct: one declined to award any punitive damages, but the other awarded $25 million in punitive damages. Juries reach inconsistent results when deliberating on punitive damages in part because the substantive standards of conduct are vague. *See Smith v. Wade*, 461 U.S. 30, 88 (1983) (Rehnquist, J., dissenting) (noting that "a vaguely defined, elastic standard like 'reckless indifference' gives free reign to the biases and prejudices of juries").

This may not suggest that the substantive standard of conduct for punitive damages should be a matter of federal constitutional law. *Haslip*, 111 S. Ct. at 1055 (Kennedy, J., concurring) (noting the "features of the jury system for assessing punitive damages," including the jury instructions, "discourage uniform results, but nonuniformity cannot be equated with constitutional infirmity"). But it does show why, in the context of punitive damages, defendants have an important interest in rational decisionmaking: there are many opportunities for erroneous verdicts awarding punitive damages. *See Haslip*, 111 S. Ct. at 1043 (noting concern with punitive damages that "run wild"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("[J]uries assess punitive damages *in wholly unpredictable amounts* bearing no necessary relation to the actual harm caused.) (emphasis added). Just as important, vague standards make it difficult in many courtrooms to keep the question of punitive damages from the jury by way of a directed verdict.

The Court's approval of Alabama's procedures in *Haslip* suggests a flexible rather than rigid approach to

the protections required by due process. Indeed, the Court observed that it could not "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case," but concluded that "general concerns of reasonableness and adequate guidance from the court . . . properly enter into the constitutional calculus." *Haslip*, 111 S. Ct. at 1043. The Court noted with approval that some states, unlike Alabama, impose a "clear and convincing evidence" or "beyond a reasonable doubt" burden of proof on plaintiffs seeking punitive damages. *Id.* at 1046 n.11. The Court concluded, however, that the weaker Alabama standard was constitutionally sufficient, "buttressed, as it is, by the procedural and substantive protections . . ." required by Alabama law. *Id.*

Thus, *Haslip* teaches that so long as a State gives meaningful protection to the defendant's legitimate interest in rational decisionmaking, whether by adopting an Alabama-like system, or by some other but equally effective means, procedural due process is satisfied.

The West Virginia courts failed to provide *any* of the *Haslip* procedural protections in this case. Instead, the court below adopted a new substantive standard phrased in colloquial terms: awards against "really stupid" defendants could not exceed actual damages by "*roughly* five to one," while awards against "really mean" defendants were subject to no limits. *TXO Prod.*, 419 S.E.2d at 889 (emphasis in original). The amount of punitive damages assessed against Petitioner demonstrates that this substantive test failed to balance rational decisionmaking with appropriate punishment, and therefore did not provide an adequate substitute for the procedural protections approved by this Court's decision in *Haslip*.

The "test" announced by the West Virginia court in *TXO Production* is particularly surprising in light of that court's decision in *Garnes v. Fleming Landfill, Inc.*,

413 S.E.2d 897, 907 (W. Va. 1991). In that case, the West Virginia court correctly recognized that the decision in *Haslip* offers "guidelines" rather than "clear, bright-line rules." The court determined that West Virginia law did not provide the necessary safeguards against excessive awards, and accordingly fashioned procedural protections comparable to those approved in *Haslip*. The court announced that trial and appellate courts must review awards of punitive damages in West Virginia by application of the detailed and substantive standards applied in Alabama. *Id.* at 909-10 (citing *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222 (Ala. 1989)). The court further determined that instructions to the jury must explain several of these factors as relevant to the amount of punitive damages awarded, a protection not provided by Alabama law. *Compare id.* at 909 (instructions should advise jury to consider, *inter alia*, whether defendant was aware of harm caused by conduct, any efforts to conceal actions, similar past conduct and the profitability of the wrongful conduct) *with Haslip*, 111 S. Ct. at 1044 (approving jury instruction that explained purpose and nature of punitive damages and fact that imposition not compulsory).

The judgment below, therefore, is plainly inconsistent not only with *Haslip*, but also with *Garnes*. *Haslip* affords the States wide flexibility in choosing the procedural means of satisfying due process. The difficulty is in determining what procedural protections against irrational punitive damages are required by due process as a baseline minimum. A number of courts have stumbled here, and the result has been a substantial divergence in the application of *Haslip*. *Compare Mason v. Texaco Inc.*, 948 F.2d 1546, 1560 (10th Cir. 1991) ($25,000,000 punitive damages award reviewed only by application of a "shock the conscience" measure for excessiveness), *cert. denied*, 112 S. Ct. 1941 (1992) *and Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1385 (5th Cir. 1991) (court concludes that punitive damages award 500

times greater than actual damages "reasonable" without applying *Haslip* substantive standards) *with Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342, 1347 (8th Cir. 1991) ($8,000,000 award of punitive damages reversed and remanded with directions to review the award under the criteria approved in *Haslip) and American Employers Ins. Co. v. Southern Seeding Servs., Inc.*, 931 F.2d 1453, 1458 (11th Cir. 1991) (district court's summary denial of post-trial motions did not meet *Haslip* due process standards in case involving $750,000 punitive damages award).

There are three components of the *Haslip* procedures that should be deemed essential: a post-trial hearing on the record; the exclusion from the jury of evidence concerning the defendant's wealth; and the consideration of prior awards against the defendant in reviewing the amount of any punitive damages. These essential components—if identified by this Court in *TXO Production* as presumptively required by due process—will protect against excessive awards of punitive damages while serving the State's legitimate goals of punishing and deterring wrongful conduct. Where a State chooses to vary these procedures, the burden should then shift to the plaintiff to show that the State gave the defendant equally effective safeguards.

II. THREE ESSENTIAL COMPONENTS OF THE ALABAMA PROCEDURE APPROVED IN *HASLIP* SHOULD BE PRESUMPTIVELY REQUIRED BY DUE PROCESS

A. A Post-Trial Hearing on the Record Should Be Required by Due Process

In *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), this Court noted with approval the requirement that trial courts, in reviewing awards of punitive damages, "are 'to reflect in the record the rea-

sons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages.'" *Id.* at 1044 (quoting *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986)). This Court approved the award in *Haslip* in part because this post-verdict process ensures "meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages." *Haslip*, 111 S. Ct. at 1044. Indeed, the Court suggested that less rigorous review standards in other states which require only consideration of the trial record to determine if the jury's verdict is "grossly excessive" or the result of "passion, bias and prejudice," do not satisfy due process. *Id.* at 1045 n.10; *accord Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 908 (W. Va. 1991) (trial court review of award of punitive damages that considered only whether award resulted from "passion, prejudice or corruption in the jury" insufficient under due process standards announced in *Haslip*).

The detailed and substantive review in the trial court approved by *Haslip* plainly requires a hearing on the record. The criteria applied in reviewing the award necessarily require the court to look beyond the evidence elicited at trial: for example, while evidence of the defendant's wealth is excluded from trial in accordance with Alabama law, the trial court considers the excessiveness of the award by weighing the "financial position" of the defendant. *Haslip*, 111 S. Ct. at 1045. The trial court also must receive evidence of other factors not heard by the jury, such as the existence of other civil awards against defendant for the same conduct. *Id.* at 1044.

The Fourth Circuit *en banc* has recognized the "almost de novo" nature of this post-trial review process:

> [T]he *almost de novo post-verdict* and appellate reviews conducted by Alabama's trial courts and the Supreme Court of Alabama provided "a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages"

> to satisfy due process. . . . [T]he trial courts and the Supreme Court of Alabama review facts, *take new evidence, find additional facts, and actually adjust jury awards of punitive damages.*

Johnson v. Hugo's Skateway, 974 F.2d 1408, 1414 (4th Cir. 1992) (*en banc*) (citation omitted) (emphasis added). Indeed, in *Garnes* the West Virginia Supreme Court of Appeals recognized that "all of the information [relevant to the *Haslip* review factors] is not available to the jury," and must be considered instead by the trial court when measuring the award for excessiveness against these factors. *Garnes*, 413 S.E.2d at 909 (W. Va. 1991).

The post-verdict review of punitive damages awards conducted by the Alabama trial courts, together with careful appellate review, supplies the "definite and meaningful constraint on the discretion of [the] fact finders" required by due process. *Haslip*, 111 S. Ct. at 1045. The review is meaningful because it rests on specific criteria, uses evidence both from the trial and from the post-trial hearing, and finally requires an explicit assessment of the award *on the record*. *See id.* at 1044-45. For these reasons, *amici* submit that a post-verdict hearing on the record should be a presumptive requirement in all cases where punitive damages are awarded.

B. Due Process Prohibits Jury Consideration of the Defendant's Wealth

The jury in *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va.), *cert. granted*, 113 S. Ct. 594 (1992), considered evidence of Petitioner's financial condition in arriving at its $10 million award of punitive damages, and the submission of this evidence was approved by the West Virginia Supreme Court of Appeals. In *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032, 1043-44 (1991), this Court emphasized that the Alabama rule excluding net worth evidence at

trial was an important part of the "constitutional calculus." The Court reasoned that in punitive damages cases "the fact finder must be guided by more than the defendant's net worth," and noted that plaintiffs should not "enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Id.* at 1045. Because excluding evidence of the defendant's wealth from the jury is necessary for rational decisionmaking, this component of *Haslip* should be presumptively required by procedural due process.

Evidence of the defendant's financial condition encourages the jury to fix an amount of punitive damages reflecting the defendant's *status* rather than the defendant's *conduct*. Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages And The Rule Of Law: The Role Of Defendant's Wealth*, 18 J. Legal Studies 415, 423 (1989) ("[P]unishment based on the characteristics of the actor invites erratic and random responses to concerns that have nothing to do with specific misconduct."); *cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) (noting that evidence of wealth of a municipality in the form of its taxing power "may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award" of punitive damages). *Haslip* emphasizes that the fact finder must focus solely on *objective* factors in order to ensure that punitive damages awards are rational and bear a reasonable relationship to the amount of compensatory damages awarded. *See Haslip*, 111 S. Ct. at 1045 (the Alabama procedures "ensure that punitive damages are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages"). The introduction of wealth evidence defeats this focus by inviting the jury to consider *not* the nature of the offense and the harm caused, but rather the defendant's "deep pocket."

A recent Reporters' Study for the American Law Institute concluded that evidence of the defendant's wealth

improperly induces juries to consider defendant's status rather than the conduct at issue. 2 American Law Institute, *Reporters' Study: Enterprise Responsibility for Personal Injury* 254 (1991). The Reporters reasoned that "what is relevant is not the defendant's *overall* wealth, but rather the profit it realized from the particular tortious activity in question," and accordingly the Reporters recommended that evidence of the defendant's wealth not be admissible in punitive damages cases. *Id.* at 254-55 (emphasis in original).

The Reporters' Study conclusion is consistent with the procedure provided by Alabama law and approved by this Court in *Haslip*. 111 S. Ct. at 1044-45 (evidence of net worth excluded at trial but trial and appellate courts consider "the profitability to the defendant of the wrongful conduct" in reviewing award of punitive damages for excessiveness). The focus on profitability suggested by the Reporters' Study also appropriately fixes attention on the relevant time period—the time of the wrongful conduct—and not the *current* status of defendant as reflected by net worth evidence. *See Mason v. Texaco Inc.*, 948 F.2d 1546 (10th Cir. 1991) (jury considered evidence of defendant's *current* financial condition and awarded $25 million in punitive damages for actions taken more than a decade earlier), *cert. denied*, 112 S. Ct. 1941 (1992).

Although the West Virginia Supreme Court of Appeals, in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991), mistakenly found that "[t]he financial position of the defendant is relevant" to the jury's consideration of punitive damages, *id.* at 909,[2] it nonetheless

[2] In a case on remand from this Court for further consideration in light of *Haslip*, Judge Peterson of the California Court of Appeal has written a significant and interesting concurring opinion that focuses on the supposed common law basis for admitting evidence of the defendant's wealth. *AMCA Int'l Fin. Co. v. Hilgedick*, 111 S. Ct. 2253 (1991) (granting cert. and remanding), *on remand sub*

recognized that other, similar facts should be *withheld* from the jury:

> [W]e would not have the subject of insurance raised before the jury, nor would we have any explicit argument about settlement offers . . . . However, these are fit subjects to instruct the trial judge's understanding of the appropriateness of a particular punitive award at the post-trial review stage . . . .

Id. at 910. Similarly, courts consistently exclude from jury consideration evidence of the net economic effect on the parties of verdicts awarding money damages. *See, e.g., Hansen v. Johns-Manville Sales Prods. Corp.*, 734 F.2d 1036, 1045 (5th Cir. 1984) (jury not instructed regarding tax consequences of an award of actual damages since to do so would "introduce[] a collateral matter into the damages issue"), *cert. denied*, 470 U.S. 1051 (1985); *Pollock & Riley, Inc. v. Pearl Brewing Co.*, 498 F.2d 1240, 1242-43 (5th Cir. 1974) (jury in antitrust case not informed that any damages award trebled by operation of law), *cert. denied*, 420 U.S. 992 (1975); *Kiernan v. Van Schaik*, 347 F.2d 775, 781 (3d Cir. 1965) (evidence of defendant's liability insurance not admissible because it would lead to "extravagant verdicts"). The same rule of exclusion is equally appropriate in the case of the defendant's wealth.

An important component of the defendant's interest in rational decisionmaking is the right to be judged on its conduct, not on its status. This Court suggested in *Haslip* that exclusion of evidence of defendant's net worth properly confines jury discretion to "the character and the

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nom., Hilgedick v. Kaehring Fin. Corp., 8 Cal. Rptr. 2d 76, 100-03 (Ct. App.) (Peterson, J., concurring), *review granted*, 832 P.2d 899 (Cal. 1992). Judge Peterson would have held that evidence of the defendant's wealth should be confined to post-trial consideration by the trial and appellate courts. His careful review of the "strange history" of the admissibility of such evidence led him to conclude that this doctrine has a weak footing in precedent.

degree of the wrong . . . and the necessity of preventing similar wrong." *Haslip*, 111 S. Ct. at 1044. *TXO Production* provides an opportunity to clarify this aspect of the Court's decision in *Haslip*, and require that the fact finder arrive at an award of punitive damages without considering evidence of defendant's financial condition.

C. Procedural Due Process Requires Explicit Consideration of Previous Punitive Damages Awards Against the Defendant for the Same Course of Conduct

The inquiry into the excessiveness of a single punitive damages verdict is complicated when that verdict is merely one of several arising out of the same course of conduct by the defendant. The State, by permitting juries to award punitive damages, is seeking to punish the defendant for that unitary course of conduct, and to deter others from similar conduct. The excessiveness of any one award cannot be considered in a vacuum. Instead, to protect the defendant's interest in rational decisionmaking, the courts must measure whether the awards taken *together* are excessive.

This Court recognized due process limits to multiple punitive damages awards in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032, 1045 (1991), by approving consideration of "the existence of other civil awards against the defendant for the same conduct, these . . . to be taken in mitigation" upon review of the punitive damages award. This factor has special significance for due process because it directly implicates both the State's interest in deterrence and retribution, and the defendant's interest in rational decisionmaking: in the absence of a mechanism for considering previous awards, there is no way to determine whether the award at issue is excessive with respect to "appropriate deterrence and retribution." *Id.* at 1044. *See Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989) ("We agree that the multiple

imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle.").

Haslip involved the assessment of a single award of punitive damages, and discussion of "excessiveness" therefore turned to the ratio of punitive to actual damages: this Court approved an award that was approximately four times the amount of compensatory damages awarded, but noted that the ratio "may be close to the line." *Haslip*, 111 S. Ct. at 1046. In the case at hand, Petitioner urges that the ratio of 526:1 is presumptively excessive.

The discussion of ratios notwithstanding, this Court announced in *Haslip* that an award of punitive damages may not exceed the amount necessary to achieve "appropriate deterrence and retribution." *Id.* at 1044. Under this test, the ratio of punitive to actual damages created by a single award cannot be the sole measure of excessiveness: no matter the ratio, the award may be excessive if a defendant already has paid several awards of punitive damages for the same course of conduct. For example, in *TXO Production*, evidence admitted at trial suggests that Petitioner's course of conduct with respect to oil and gas rights has subjected it to potential liability for punitive damages awards to parties other than Respondents. *See TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870, 881-86 (W. Va.) (trial court properly admitted testimony of lawyers regarding litigation against TXO Production over payment of royalties and obtaining drilling rights), *cert. granted*, 113 S. Ct. 594 (1992). The $10 million award assessed in this case may be excessive because it is grossly disproportionate to the actual damages award, but it also is excessive if Petitioner has paid other punitive damages awards for the same course of conduct. Petitioner's interest in a rational decisionmaking process therefore demands that review of an award of punitive damages invokes consideration of other punitive damages awards for the same course of conduct.

Multiple awards of punitive damages undermine the public policy objectives underlying punitive damages assessments. The constitutionally permissible purposes that justify the awarding of punitive damages—punishment and deterrence—focus upon the defendant's conduct, not the compensation to an individual plaintiff. *See City of Newport v. Fact Concerts*, 453 U.S. 247, 266-67 (1981) ("Punitive damages by definition are not intended to compensate the injured party, but rather to punish . . . and to deter . . . ."). Punitive damages awarded to a fully compensated plaintiff are a windfall, but are based on putative public policy objectives. If those objectives already have been achieved in cases arising out of the same course of conduct, then no legitimate governmental objective remains that would allow funds of a defendant to be transferred to a plaintiff.

In considering whether a punitive damages award is reasonably related to the goals of deterrence and retribution, it is important to consider the effect of multiple punitive damages for the same course of conduct. In the words of Judge Henry Friendly:

> The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering . . . . We have the greatest difficulty in perceiving how claims for punitive damages in such *a multiplicity of actions throughout the nation can be so administered as to avoid overkill.*

Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967) (emphasis added). Only by requiring courts to consider in the review of each punitive damages award all other awards generated by that course of conduct will "overkill" be avoided, and the goals of rational decisionmaking and appropriate retribution and deterrence satisfied.

In *TXO Production*, this Court should clarify that procedural due process requires a state, in the post-trial review of a punitive damages verdict for excessiveness, to give explicit consideration to the existence of other awards against the defendant for the same course of conduct. *Haslip*, 111 S. Ct. at 1045.

CONCLUSION

The judgment below with respect to punitive damages should be reversed.

Respectfully submitted,

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